In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1379

TAHOE NUGGET, INC., dba JIM KELLEY'S TAHOE NUGGET, and NEVADA LODGE,

Petitioners,

VS.

NATIONAL LABOR RELATIONS BOARD, and HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, AFL-CIO,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT UNION'S BRIEF IN OPPOSITION

GEOFFREY V. WHITE
351 California Street, Fourth Floor
San Francisco, California 94104
(415) 433-7200
Counsel for Respondent Union

DAVIS, COWELL & BOWE
PHILIP PAUL BOWE
351 California Street, Fourth Floor
San Francisco, California 94104

May 7, 1979

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7962

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1379

TAHOE NUGGET, INC., dba JIM KELLEY'S TAHOE NUGGET, and NEVADA LODGE,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, and HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, AFL-CIO,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT UNION'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 584 F.2d 293. The decisions and orders of the Board (Supp. App. 1-89) are reported at 227 N.L.R.B. 357 and 227 N.L.R.B. 368.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1978, after consolidation of the two cases for

argument and decision. A timely petition for rehearing was denied on October 20, 1978 (Pet. App. 29-30). On January 9, 1979, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including March 10, 1979. The instant petition was filed on March 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Board abused its discretion in holding that the presumption of majority status, derived from petitioners' voluntary recognition of the Union as the representative of their own employees, could not be defeated by petitioners' subsequent withdrawal from a multiemployer bargaining unit?

2. Whether the Board's finding that petitioners had not established a reasonably grounded doubt of the Union's majority status was supported by substantial evidence?

STATUTE INVOLVED

1. Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a), provides in relevant part:

> "It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 * * *;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees * * *."

2. Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), provides in relevant part:

> "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board * * * shall have power to issue and cause to be served upon such person a complaint stating the charges * * * and containing a notice of hearing * * *: *Provided*, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge * * *."

STATEMENT OF THE CASE

The Brief For The National Labor Relations Board In Opposition herein succinctly and accurately states the case.

ARGUMENT

I. There Is No Conflict Among the Circuits Created By the Court of Appeal's Holding That the Presumption of Majority Status Applies In This Case

Consistent with established judicial authority, the Board held in this case that petitioners' voluntary recognition of the Union as the bargaining representative of their respective bar and culinary employees gave rise to a continuing presumption of the Union's majority support among those employees. (Supp. App. 2-3)[1] As this Court has stated, such recognition without a Union majority would violate the Act. *International Ladies' Garment Workers' Union v. N.L.R.B.*, 366 U.S. 731, 737-739 (1961). Once established, the presumption of majority support continues throughout the term of a collective bargaining agreement and beyond. *Celanese Corp. of America*, 95 N.L.R.B. 664,

---

[1] *See N.L.R.B. v. Frick Co.*, 423 F.2d 1327 (3d Cir. 1970); *N.L.R.B. v. Cayuga Crushed Stone, Inc.*, 474 F.2d 1380, 1383 (2d Cir. 1973); *N.L.R.B. v. Denham*, 469 F.2d 239 (9th Cir. 1972), *vacated on other grounds*, 411 U.S. 945 (1973).

672 (1951), *cited with approval in N.L.R.B. v. Burns Security Service,* 406 U.S. 272 n.2 (1972).

On this predicate,[2] the court of appeal upheld the Board's determination that the presumption subsisted following petitioners' withdrawal from the multiemployer unit:

> "When respondents joined the Association and recognized the Union, they implicitly declared their employees favored the Union. Thus, majority status can be directly inferred from the employer's own conduct; the presumption is not derived from the larger unit's majority, but originates with the employer's implicit declaration of a majority in the single employer unit. Moreover, the original factual inference is convincing: employers normally will not knowingly violate the law and union fraud is rare. Continued membership in the larger unit does nothing to negate this principle even though the larger unit becomes the appropriate one for bargaining. The original presumption subsists: withdrawal from the unit simply entails a reversion to the original unit, a unit previously determined from the employer's own conduct to favor union representation." (footnote omitted)
>
> [Pet. App. 17-18]

The case of *N.L.R.B. v. Richard W. Kaase Co.*, 346 F.2d 24 (6th Cir. 1965) is not at all in conflict with the holding of the Board. As petitioners acknowledge (Pet. 6), the *Kaase* court invalidated a presumption of majority status derived from a multiemployer election following the employer's withdrawal; unlike petitioners, the employer there had never voluntarily recognized that union as representative of its own employees.

[2]Plainly, then, petitioners' assertion that the Board adopted some "derivative" presumption flowing from the multiemployer bargaining relationship (Pet. 16) is without foundation. There was no concatenation of presumptions applied here, only the single presumption arising from petitioners' voluntary act of recognition.

The Board and the court of appeal properly held that petitioners could not avoid application of the presumption by now claiming that the initial recognition more than a decade earlier had been unlawful. Because petitioners' recognition of a minority union would have been an unfair labor practice occurring beyond the six-month limitation period in Section 10(b) of the Act, both the Board and the court of appeal concluded petitioners could not revive a legally defunct unfair labor practice in order to defend against a present refusal to bargain. *Local Lodge No. 1424, I.A.M. v. N.L.R.B.*, 362 U.S. 411, 416 (1960); *N.L.R.B. v. District 30, U.M.W.*, 422 F.2d 115, 122 (6th Cir. 1969), *cert. denied.* 398 U.S. 959 (1970).

Apart from disallowing petitioners' attack on the validity of the Union's presumption of majority support, the court of appeal also correctly held that the circumstances of the initial recognition could not be used to bolster petitioners' claim of subjective good faith in refusing to bargain in 1974. Even if the companies' alleged unlawful recognition were admitted to show their good faith in suddenly deciding to accord their employees a free choice of bargaining representative in 1974, the court of appeal concluded that merely subjective belief was not sufficient ground to disrupt the stability of the bargaining relationship. Consistent with other courts of appeal, the court held petitioners' claimed reasonable doubt could only be sustained by objective facts showing a majority of their em-

ployees no longer desired Union representation. *N.L.R.B. v. Vegas Vic, Inc.*, 546 F.2d 828, 829 (9th Cir. 1976), *cert. denied*, 434 U.S. 818 (1978); *Terrell Machine Co. v. N.L.R.B.*, 427 F.2d 1088, 1090 (4th Cir. 1970), *cert. denied*, 398 U.S. 929 (1970); *Lodges 1746 & 743, I.A.M. v. N.L.R.B.*, 416 F.2d 809 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1058 (1970). As the court below stated:

> "We hold the employer is free to act on the objective grounds before him, regardless of his underlying motivation. If union support is lacking, the employer's action actually furthers the cause of employee democracy by overcoming the inertia which helps maintain the status quo. Since the employer's action is not in derogation of employee rights, his subjective motivation is important only evidentially. In sum, when challenging the union majority, good faith is demonstrated if the employer is aware of the facts manifesting lack of union support and employer misconduct did not contribute to the loss of support." (footnotes omitted)[3]
>
> [Pet. App. 11-12]

Contrary to petitioners' assertion (Pet. 8), neither of the court of appeal's grounds for excluding evidence of the claimed unlawful initial recognition conflicts with the Sixth Circuit's decision in *N.L.R.B. v. Dayton Motels, Inc.*, 474 F.2d 328 (6th Cir. 1973). In *Dayton Motels*, as in this case, the court held that circumstances establishing an unfair labor practice at the time of initial recognition of the union could not ". . . constitute an attack on the validity of the

[3]In this case, the Board also found that petitioner Nevada Lodge violated Section 8(a)(1) of the Act by announcing and granting pay increases to induce employees to abandon support of the Union. (Supp. App. 44, 81).

expiring agreement or on the presumption created thereby, which attack was barred by Section 10(b) of the Act." *Id.*, 474 F.2d at 333. Consistent with the Ninth Circuit and other cases in that Circuit, it held that the employer must show both reasonable grounds for doubting the union's majority status, and good faith in asserting that doubt. *Id.*, 474 F.2d at 330; *Bally Case & Cooler, Inc. v. N.L.R.B.*, 416 F.2d 902 (6th Cir. 1969); *N.L.R.B. v. Washington Manor Inc.*, 519 F.2d 750 (6th Cir. 1975). Nevertheless, the court held, evidence of fraudulent procurement of authorization cards at the union's initial recognition was material to show the employer's subjective good faith in refusing to bargain. *Id.*, 474 F.2d at 334.

Evidence of an employer's subjective good faith could be relevant where it had already established objective grounds for doubting a union's majority status. *E.g., Bally Case & Cooler, Inc. v. N.L.R.B., supra.* But the court below held that petitioners had not established reasonable grounds for doubting the Union's majority status; petitioners' protestations of good faith were therefore immaterial, and the circumstances of initial recognition irrelevant:

> "If, but only if, the employer can show the union's majority is truly in doubt, the situation confronted is at the opposite end of the spectrum from the situation where the employer's conduct is inherently destructive of employee rights. It follows that not only is proof of anti-union motivation then unnecessary, but it is immaterial to the charge. We emphasize, however, that the employer must have ample evidence in support of his doubt before we can condone this assumption of the cause of employee democracy."
>
> [Pet. App. 11 n.24]

Consistent with the Sixth Circuit, therefore, the court below held the evidence of subjective good faith inadmissible. (Pet. App. 13)

The sole conflict between the decision of the court below and *Dayton Motels* is, as petitioners assert (Pet. 10), a difference of whether an employer's proof of reasonable good faith doubt serves as a complete defense, or whether it merely shifts the burden of going forward to the General Counsel. As the court below stated, "[s]ince the General Counsel usually relies on the presumption alone, as he did here, the distinction is primarily academic." (Pet. App. 6). The distinction is solely academic in this case, as petitioners did not sustain their burden of rebutting the Union's presumptive majority status.

II. The Court Of Appeal And The Board Properly Assessed The Cumulative Impact Of Factors Claimed To Support Petitioners' Reasonable Doubt; Accordingly, There Is No Conflict In Decisions Meriting Review

Petitioners' remaining contention is the repeated assertion that the court of appeal and the Board refused to consider the cumulative effect of the facts claimed to support the companies' reasonable doubt. (Pet. 5, 6, 11, 13, 14). That assertion simply has no basis in the record.

After analyzing each of the factors alleged by petitioner Tahoe Nugget to support its reasonable doubt, the Administrative Law Judge stated:

> "After considering all of the factors set forth above, I conclude that Respondent did not have substantial and reasonable grounds for believing the Union had lost its majority status. Respondent's assertion in that regard was based on subjective rather than objective considerations." (footnote omitted)
>
> [Supp. App. 36]

The Administrative Law Judge analyzed the same cumulative impact with regard to petitioner Nevada Lodge. (Supp. App. 77)

Similarly, the court below analyzed the cumulative effect of each of the factors asserted by petitioners, in accordance with explicit guidelines which the opinion set forth:

> "When the Board looks to the cumulative force of the evidence, the factors are reconsidered and weighed against the force of the presumption. If unexplained, the cumulative inferential weight of these equivocal factors might suffice to establish that the refusal to bargain was reasonable."[46]

[46]"But we have found no cases in which the reasonable doubt defense was sustained based solely on equivocal evidence. Common to each case was the presence of at least one factor clearly referable to a lack of majority support."
[Pet. App. 21]

The court of appeal concluded that "[n]one of the evidence is wholly referable to a decline in Union support within the relevant units", and therefore affirmed the Board's determination. (Pet. App. 28).

Petitioners are reduced to claiming the Board erred in the evidentiary weight accorded each of petitioners' asserted objective considerations, since it had previously held similar factors—once established—sufficient to justify a refusal to bargain (Pet. 14). In essence, this is a confession that petitioners have engaged in brinksmanship in

attempting to thwart collective bargaining among their employees. As another court of appeal stated in an analogous context, ". . . one who engages in 'brinksmanship' may easily overstep and tumble into the brink" *Wausau Steel Corp. v. N.L.R.B.*, 377 F.2d 369 (7th Cir. 1967). Petitioners' disagreement with the Board's findings with respect to the weight of the evidence does not merit review by this Court. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 490-491 (1951). Also, because such an evidentiary determination turns on the totality of all the circumstances, review of the Board's findings cannot have a substantial impact on other litigants.

CONCLUSION

For all the above reasons, as well as for the reasons stated in the Brief For The National Labor Relations Board in Opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP PAUL BOWE
GEOFFREY V. WHITE
351 California Street, Fourth Floor
Fourth Floor
San Francisco, California 94104
Counsel for Respondent Union

May 7, 1979